cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine, or periodical printed or circulating in the State of Utah."

A demurre was interposed to the complaint and overruled by the court, which demurrer contained the following grounds:

"That said complaint does not state facts sufficient to constitute a public offense; that the Statute upon which said complaint is based violates the provisions of Article 1, Section 1, of the Constitution of the State of Utah with respect to the inherent and inalienable right of the defendant to acquire, possess and protect its property; of Article 1, Section 7, of the Constitution of the State of Utah, with respect to deprivation of property without due process of law; of Article 1, Section 18 of the Constitution of the State of Utah, with respect to impairing the obligations of contracts; of Article 1, Section 24 of the Constitution of the State of Utah, relating to uniform operation of all laws of a general nature; (6) of Article 8, Section 5, of the Constitution of the State of Utah, in that said law, as amended, — a direct imposition by the Legislature of the State of Utah, for a tax for the purpose of cities, towns and other municipal corporations; (7) of Article 6, Section 23, of the Constitution of the State of Utah, in that it contains more than one subject and that it is not a general appropriation bill or a bill for the codification and general revision of laws, and that the title does not clearly express the contents of the law; of Article 1, Section 10 of the Constitution of the United States, respecting impairing of the obligation of contracts; of Article 1, Section 8, of the Constitution of the [fol. 10] United States relating to Interstate Commerce; of Article 1, Section 10, of the Constitution of the United States respecting impairing of the obligation of contracts; of Article 4, Section 2, of the Constitution of the United States respecting the privileges and immunities of citizens

in the several states; of the Fourteenth Amendment to the Constitution of the United States respecting the deprivation of property without due process of law and/or respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of the laws."

The State proved that the defendant, a foreign corporation maintaining an office in charge of a local manager and doing business within the State, owns, operates and maintains numerous billboards at various placed throughout the State, including one at the corner of 2nd West and 7th North Streets in Salt Lake City, upon which is a large lithograph poster 12 ft. by 25 ft. in size, containing a picture of a large gray horse bearing a lady rider, a picture of a package of Chesterfield cigarettes, with the words "Good taste takes the lead," that 2nd West Street is a highway carrying most of the traffic in and out of Salt Lake City to the communities north, and the billboard is in a conspicuous place where anyone passing along the street can see it.

Defendant offered no evidence but on cross examination of the State's witnesses proved, over objection of the State, that Chesterfield cigarettes are shipped into the State from the place of manufacture, that the lithograph poster was printed outside the State and shipped in, and that the contract for advertising these cigarettes was made by the defendant company at its main office in Ohio.

Defendant assigns as error the action of the district court in overruling the demurrer, entering judgment of conviction and passing of sentence. No question is raised as to the sufficiency of the evidence or regularity of the proceedings. Paragraphs 6 and 7 of the demurrer were not argued either orally or in the briefs, and therefore no reference to the matter contained therein is necessary. The arguments presented are wholly concerned with the constitutionality of the act in question and are substantially the same as were considered and passed on by this court in the case of State v. Packer Corporation, — Utah —, 297 Pac. 1013. The decision in that case is therefore controlling.

The evidence being sufficient and the proceedings regular, the judgment of conviction is affirmed upon authority of State v. Packer Corporation, supra.

We concur:

J. W. Cherry, C. J.; Ephraim Hanson, J.

In Supreme Court of Utah

Dissenting Opinion

Straup, J. (dissenting):

I dissent for the reasons stated in my dissenting opinion in the former case, State v. Packer Corporation, 297 Pac. 1013, — Utah — referred to in the prevailing opinion. I admit that substantially the same questions presented and decided in the former case are presented on this appeal. Should the doctrine of stare decisis be appli- I, because thereof, would on this appeal now yield my views expressed in the former case and concur in the prevailing opinion on this appeal. I, however, think the doctrine not applicable. A petition for a rehearing in the former case was filed but not ruled on until just before—the same day—the decision in this case was announced and filed. The former decision not being final until the petition for rehearing was denied, the decisions in both cases in effect are simultaneous.

[fol. 11] While a single decision though by a divided court, when existing undisturbed for some considerable time, and where because of it rights may have been acquired or a course of conduct or of dealings established, may be considered obligatory as a precedent and with respect thereto the doctrine of stare decisis applied, yet, where as here, the former decision, with two members of the court dissenting, not becoming final until the present decision is rendered and filed and until then no rule of law established with respect to the subject and no rights because thereof yet acquired nor any course of conduct or dealings established, the reasons upon which the doctrine rests being absent, the doctrine itself ceases and is rendered inapplicable. 11 Cyc. 745; Kimball v. Grantsville City, 19 Utah 368, 52 Pac. 1; Hopkins v. McCann, 19 Ills. 112; Hill v. State 112 Ga. 400, 37 S. E. 441; Westhus v. Union Trust Co., 168 Fed. 617; Hart v. Burnett, 15 Cal. 530; Becker v. Superior Court, 151 Cal. 313, 90 Pac. 689; McDonald v. Davey, 22 Wash. 366, 60 Pac. 1116; Montgomery County Fiscal Court v. Trimble, 104 Ky. 629; Jackson Co. v. State, 155 Ind. 604.

Further, by the decision in the former case and in this case the validity of the act considered as to whether it was unauthorized by and in conflict with not only provisions of

the State Constitution but of the Federal Constitution as well was directly in question and determined, and thus the determination in the former case was not by a court having final jurisdiction of the question involved. And where a decision of a tribunal is subject to review by a higher and final tribunal, or the question determined may be passed on by a higher and final tribunal in another case, the doctrine of stare decisis does not apply with full force, until the same question or questions have been determined by the court of last resort. 17 R. C. L. 1005; Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 27 Colo. 116, 59 Pac. 607, 50 L. R. A. 209.

For the same reason, law of the case could not be invoked even were this a second appeal of the same case. Roach v. Los Angeles & S. L. R. Co. (on petition for rehearing) — Utah —, 280 Pac. 1063 and cases noted in 41 A. L. R. 1078. But here there were no two appeals of the same case. The appeals are appeals of two distinct and separate cases involving two separate offenses and transactions, though similar in character and involving violations of the same act. So also for such reason, the doctrine of law of the case may not be invoked.

I therefore still dissent and think the act invalid for the reasons stated in my dissenting opinion in the former case.

IN SUPREME COURT OF UTAH

DISSENTING OPINION

ELIAS HANSEN, J. (dissenting):

I was not in accord with the results reached by the majority of the members of this court in the former case of State v. Packer Corporation, — Utah —, 297 Pac. 1013. I am still of the opinion that a different result should have been reached in that case. And for reasons just stated by Mr. Justice Straup I also am of the opinion that the decision in the former case is not as a precedent of controlling effect on this appeal and therefore dissent from the conclusion reached in the prevailing opinion herein affirming the judgment of the court below.

[fol. 12] Minute entry of argument and submission, May 29, 1931, omitted in printing.

[fol. 13] In Supreme Court of Utah, Regular May Term

5177

The State of Utah, Respondent,

v.

The Packer Corporation, Appellant

Judgment—July 30, 1931

This cause having been heretofore argued and submitted and the court being sufficiently advised in the premises, it is now ordered, adjudged, and decreed that the judgment of the district court herein be, and the same is, affirmed.

Opinion of the Court by Folland, J. Cherry, C. J., and Ephraim Hanson, J., concur. Straup, J., and Elias Hansen, J., dissent.

[fol. 14] In Supreme Court of Utah

[Title omitted]

Order Denying Rehearing—August 25, 1931

Petition for Rehearing in this cause coming on to be heard this day, Mr. W. H. Reeder, Jr. and Mr. Dan B. Shields appearing as counsel for appellant in support of the petition, and Mr. Byron D. Anderson, Deputy Attorney General, appearing for the State and resisting the said petition, and the court being sufficiently advised in the premises, it is now ordered, adudged, and decreed that said Petition for Rehearing be, and the same is, denied, and the judgment and decree heretofore entered be, and the same shall bcome and is final as of July 30 ,1931.

Straup, J., and Elias Hansen, J., dissenting.

[fols. 15-19] Petition for rehearing, covering five pages, omitted from this print. It was denied, and nothing more by order of August 25, 1931.

[fol. 20] Judge's certificate to record omitted in printing.

[fol. 21] IN CITY COURT OF SALT LAKE CITY, SALT LAKE COUNTY, STATE OF UTAH

#19680

STATE OF UTAH

vs.

THE PACKER CORPORATION and GEORGE W. HAMLYN

F. A. Trottier, Atty. for State.
Dan B. Shields, Atty. for Defendants.

Transcript

PROCEEDINGS

1921.

April 28. Filed complaint of W. L. Maughan, charging defendants with the crime of Displaying Cigarette advertisement on a Bill Board in Violation of Section 2, of an act amending Section, Chapter 145, Laws of Utah, 1923, as amended by House Bill No. 97 by Mr. Critchlow, passed by the Legislature of the State of Utah.

" 28. Warrant of arrest issued.

May 1. Warrant filed on return.

April 29. Deft. George W. Hamlyn present with counsel. Reading of complaint waived and plea of not guilty entered. Case tried.

State's motion to amend title of complaint by interlineation granted.

W. L. Maughan sworn for state.

State rests.
Defts. rest.
Court found deft. G. W. Hamlyn not guilty.
Court found deft. The Packer Corporation guilty as charged.
Time for sentence waived.
Court sentenced deft. The Packer Corporation to pay a fine of $50.00.

April 30. Filed notice of appeal.
" 30. Filed Undertaking on appeal.
May 4. Transcript to District Court.

James A. Stump, City Judge and ex Officio Justice of the Peace.

[fol. 22] IN CITY COURT OF SALT LAKE CITY

[Title omitted]

NOTICE OF APPEAL

To the above-named plaintiff and to Matthew Cowley, county attorney:

You and each of you will please take notice that the Packer Corporation hereby appeals to the District Court of Utah in and for Salt Lake County from the judgment entered against it in the above entitled action on the 29th day of April, 1931.

This appeal is taken upon questions of law and of fact,
Wm. Reeder, Jr., Dan B. Shields, Attorneys for Defendant.

Copy received this 30th day of April, 1931.
L. O. Thomas, Acct. County Atty., Attorney for Plaintiff.

[fol. 23] IN CITY COURT OF SALT LAKE CITY

Before James A. Stump, City Judge and ex-Officio Justice of the Peace

19680

THE STATE OF UTAH

vs.

THE PACKER CORPORATION and GEORGE W. HAMLYN, Defendant.

COMPLAINT

On this 24th day of April A. D. 1931 before me James A. Stump, City Judge and Ex-Officio Justice of the Peace of the City Court within and for Salt Lake City, Salt Lake County, State of Utah, personally appeared W. L. Maughan who, on being sworn by me, on his oath, did say that The Packer Corporation and George W. Hamlyn on the 22nd day of April A. D. 1931, at the County of Salt Like, State of Utah, did commit the crime of displaying cigarette advertisement on a bill board in violation of Section 2, of an act amending Section 2, Chapter 145, Laws of Utah, 1921, as amended by Chapter 52, Laws of Utah, 1923, as amended by Chapter 92, Laws of Utah 1929, as follows, to wit:

That the said The Packer Corporation and George W. Hamlyn, at the time and place aforesaid, did wilfully and unlawfully display in Salt Lake City, Salt Lake County, State of Utah, on a bill board owned and operated by the defendant, an advertisement of Chesterfield Cigarettes by displaying a representation of a package of Chesterfield Cigarettes with the words "Good taste takes the lead;"

Contrary to the provisions of the Statute of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah.

W. L. Maughan.

Subscribed and sworn to before me the day and year first above writted. James A. Stump, City Judge and ex-Officio Justice of the Peace.

[fol. 24] IN DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH, Plaintiff,

vs.

THE PACKER CORPORATION, a Corporation, Defendant

DEMURRER

Comes now the Packer Corporation, the defendant herein, and demurs to plaintiff's complaint on file herein and as grounds thereof, alleges:

1. That said complaint does not state facts sufficient to constitute a public offense.

2. That the statute upon which said complaint is based violates the provisions of Article 1, Section 1, of the Constitution of the State of Utah with respect to the inherent and inalienable right of the defendant to acquire, possess, and protect its property.

3. That the statute upon which said complaint is based violates the provisions of Article 1, Section 7, of the Constitution of the State of Utah, with respect to deprivation of property without due process of law.

4. That the statute upon which said complaint is based violates the provisions of Article 1, Section 18 of the Constitution of the State of Utah, with respect to impairing the obligation of contracts.

5. That the statute upon which said complaint is based violates the provisions of Article 1, Section 24 of the Constitution of the State of Utah, relating to uniform operation of all laws of a general nature.

[fol. 25] 6. That the statute upon which said complaint is based violates the provisions of Article 8, Section 5, of the Constitution of the State of Utah, in that said law, as amended, is a direct imposition by the Legislature of the State of Utah, for a tax for the purpose of cities, towns, and other municipal corporations.

7. That the statute upon which said complaint is based violates Article 6, Section 23, of the Constitution of the State of Utah, in that it contains more than one subject

and that it is not a general appropriation bill or a bill for the codification and general revision of laws, and that the title does not clearly express the contents of the law.

8. That the statute upon which said complaint is based violates the provisions of Article 1, Section 10, of the Constitution of the United States, respecting impairing of the obligations of contracts.

9. That the statute upon which said complaint is based violates the provisions of Article 1, Section 8, of the Constitution of the United States relating to Interstate Commerce.

10. That the statute upon which said complaint is based violates the provisions of Article 1, Section 10, of the Constitution of the United States, respecting impairing of the obligation of contracts.

11. That the statute upon which said complaint is based violates the provisions of Article 4, Section 2, of the Constitution of the United States respecting the privileges and immunities of citizens in the several states.

12. That the statute upon which said complaint is based violates the provisions of the Fourteenth Amendment to the Constitution of the United States, respecting the deprivation of property without due process of law and/or [fol. 26] respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of the laws.

Wherefore defendant prays that said complaint be dismissed.

W. H. Reeder, Jr., Dan B. Shields, Attorneys for Defendant.

Copy of the foregoing demurrer received this 8th day of May, 1931.

Ray Van Cott, Attorney for Plaintiff.

[fol. 27] In District Court of Salt Lake County

[Title omitted]

Motion to Dismiss Action and Discharge Defendant

Now comes the defendant herein and moves the Court to dismiss the above entitled action and discharge the defendant herein upon the grounds and for the reasons:

1. That the complaint herein does not state facts sufficient to constitute a public offense.

2. That there is insufficient evidence introduced in this action upon which to sustain a conviction that the defendant is guilty of the offense alleged in the complaint.

3. That the statute upon which said complaint is based violates the provisions of Article 1, Section 1, of the Constitution of the State of Utah, with respect to the inherent and inalienable right of the defendant to acquire, possess and protect its property.

4. That the statute upon which said complaint is based violates the provisions of Article 1, Section 7, of the Constitution of the State of Utah, with respect to deprivation of property without due process of law.

5. That the statute upon which said complaint is based violates the provisions of Article 1, Section 18, of the Constitution of the State of Utah, with respect to impairing the obligation of contracts.

6. That the statute upon which said complaint is based violates the provisions of Article 1, Section 24, of the Con-
[fol. 28] stitution of the State of Utah, relating to uniform operation of all laws of a general nature.

7. That the statute upon which said complaint is based violates the provisions of Article 1, Section 10, of the Constitution of the United States, respecting impairing of the obligation of contracts.

8. That the statute upon which said complaint is based violates the provisions of Article 1, Section 8, of the Constitution of the United States relating to Interstate Commerce.

9. That the statute upon which said complaint is based violates the provisions of Article 1, Section 10, of the Constitution of the United States, respecting impairing of the obligation of contracts.

10. That the statute upon which said complaint is based violates the provisions of Article 4, Section 2, of the Constitution of the United States respecting the privileges and immunities of citizens in the several states.

11. That the statute upon which said complaint is based violates the provisions of the Fourteenth Amendment to the Constitution of the United States, respecting the deprivation of property without due process of law and/or respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of the laws.

This motion is based upon the complaint on file herein, the evidence ontroduced herein and upon all records and files in this cause.

W. H. Reeder, Jr., Dan B. Shields, Attorneys for Defendant.

[fol. 29] In District Court of Salt Lake County

Case Number 9064

The State of Utah, Plaintiff,

vs.

The Packer Corporation, Defendant

Entered order. Dated May 8, 1931.

David W. Moffat, Judge.

Judgment

This case comes now on for trial on defendant's appeal from judgment rendered in the City Court of Salt Lake City, Ray Van Cott, District Attorney, appearing in behalf of the State, and Dan B. Shields appearing in behalf of the defendant. Comes now Dan B. Shields and waives the reading of the complaint and enters a plea of "Not Guilty" in behalf of the defendant. Defendant's demurrer

to the complaint is submitted to the Court without argument and by the Court overruled. Pursuant to stipulation of the attorneys, trial by jury is waived. Wesley L. Maughr and George W. Hamlyn are sworn and examined in behalf of the State. The State rests. Comes now counsel for the defendant and moves the Court to dismiss the complaint and discharge the defendant. Said motion is submitted to the Court without argument by counsel for the defendant, and by the Court denied. The defendant rests. Both sides rest. The testimony being concluded and the Court being now fully advised in the premises; finds the defendant guilty of the crime as charged in the complaint on file herein. Said defendant waives time for sentence, and the Court thereupon pronounces the following judgment and sentence upon the defendant:

"It is the judgment and sentence of this Court that you, the Packer Corporation, be sentenced to pay a fine in the sum of $100.00."

Upon motion of counsel for the defendant, it is ordered that the execution of said sentence be stayed pending appeal.

[fol. 30] In District Court of Salt Lake County

[Title omitted]

Certificate of Probable Cause

The undersigned, David W. Moffat, one of the judges of the above entitled court, and the Judge before whom the above matter was heard, hereby certify that in my opinion there is probable cause for the appeal to the Supreme Court of Utah, which is about to be taken.

Dated this 13th day of May, 1931.

David W. Moffat, Judge.

Attest:

Alonzo Mackay, Clerk, by E. R. Warner, Deputy Clerk.

[fol. 31] IN DISTRICT COURT OF SALT LAKE COUNTY

[Title omitted]

NOTICE OF APPEAL

To the State of Utah and to Ray Van Cott, District Attorney:

You and each of you will please take notice that the defendant, The Packer Corporation, hereby appeals to the Supreme Court of the State of Utah from the judgment of conviction entered against it on the 8th day of May, 1931.

This appeal is taken both upon questions of fact and of law.

Govern yourselves accordingly.

W. H. Reeder, Jr., Dan B. Shields, Attorneys for Defendant.

Copy received this 12 day of May, 1931.

Ray Van Cott, District Attorney.

[fol. 32] IN DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

Case No. 9064

STATE OF UTAH, Plaintiff,

vs.

THE PACKER CORPORATION and GEORGE W. HAMLYN, Defendants

Bill of Exceptions

Be it remembered, that the above entitled matter came regularly on for hearing before the Honorable David W. Moffat, one of the Judges of the above entitled Court, on the 8th day of May, A. D. 1931.

APPEARANCES OF COUNSEL

For the Plaintiff: Ray Van Cott, Sr., District Attorney in and for Salt Lake County, State of Utah.

For the Defendants: Dan B. Shields, Esq.

Thereupon the following proceedings were had:

Mr. Shields: I take it, in the light of the circumstances attached to this complaint, the demurrer can be submitted.

The Court: The demurrer raises the same questions that were heretofore raised?

Mr. Shields: Exactly.

The Court: This court sustained the demurrer, and the matter went to the Supreme Court, and the Supreme Court reversed the decision. This court now faces the situation of reversing its own decision in pursuance of authority of the Supreme Court, and the further situation is now that the Supreme Court of the United States may have the opportunity of still further reversing or affirming it, as the case may be.

[fol. 33] Mr. Van Cott: I take it then that the demurrer is overruled.

The Court: You submit the demurrer without argument? The demurrer may be overruled on the authority of the case heretofore decided by the Supreme Court raising the same question.

Mr. Van Cott: Mr. Shields is representing the defendants?

Mr. Shields: Yes.

Mr. Van Cott: Do you wish a jury in this case?

Mr. Shields: We waive a jury.

Mr. Van Cott: The State is ready to proceed.

The Court: You may proceed.

Mr. Van Cott: I will call Mr. Wesley L. Maughan.

Wesley L. Maughan was thereupon called as a witness for and on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Van Cott:

Q. State your name.

A. Wesley L. Maughan.

Q. You are an officer in the County Sheriff's office?

A. Yes sir.

Q. What position do you hold?

A. Deputy sheriff.

Q. Did you have occasion to swear to this complaint against the Packer Corporation?

A. Yes sir.

Q. I will ask you to state if you made any investigation to ascertain if it had its advertisement upon a billboard in this County of a certain cigarette advertisement?

A. Yes sir.

Q. Where is that billboard?

[fol. 34] A. On the southeast corner of 7th North and 2nd West.

Mr. Shields: For the purpose of the record, I desire to move that the evidence heretofore submitted, except the formal testimony that Mr. Maughan is an officer—I desire to move that his answers to all the questions be stricken and no evidence be received along this type, upon the ground and for the reason that such evidence would be in violation and contravention of the Constitution of the State of Utah and the Constitution of the United States, as set forth already in the demurrer heretofore filed.

The Court: Objection overruled.

Mr. Shields: Take an exception. May we have, for the purpose of the record, the same objection to each question.

The Court: For the purpose of the record you may.

By Mr. Van Cott:

Q. Was that street in Salt Lake County, State of Utah?

A. Yes, it was.

Q. Salt Lake City?

A. Salt Lake City.

Q. Will you describe the nature of the advertisement on that board at that time?

A. It is a large board, with a gray horse bearing a lady rider, and either in the center or on one side is a picture of a package of Chesterfield Cigarettes, with the slogan, or wording, to the effect that "Good taste takes the lead."

Q. What was the approximate size of that billboard upon which was displayed this cigarette advertisement, with the horse and its rider?

A. Approximately it was 15 by maybe 30 feet in dimensions.

Q. State whether or not—or state how it was displayed so far as the public is concerned, with reference to streets?

[fol. 35] A. In a very conspicuous place, where anyone driving from Salt Lake County to the north could see it.

Q. Displayed so those traveling on which streets could see it?

A. 2nd West and 7th North.

Q. What is the character of 2nd West Street, and what was it at all times mentioned in the complaint?

A. It is the street taking most of the traffic out of Salt Lake County into the counties north, a through highway.

Mr. Shields: Before the testimony is introduced, I would like to have it appear that the record show that a plea of not guilty is entered there before any other proceeding.

The Court: The court was under the impression that the defendant has already pleaded. The record may show, before any testimony is introduced, and after the overruling of the demurrer, that a plea of not guilty to the complaint is entered by the defendants.

By Mr. Van Cott:

Q. State, Mr. Maughan, whether or not there was any other display upon that board than the one you have described?

A. No, there wasn't anything other than the name of the company operating the billboard.

Q. State what name was on the board?

A. On a piece of green board it had the name of "Packer" on it.

Q. "Packer Corporation"?

A. No, just "Packer".

Q. State whether or not you discussed the matter with any person who represented the Packer Company as to that display?

A. No, I didn't.

Q. Was that scene on that board, and displayed there on the 22nd of April, 1931?

A. It was.

Q. Do you know for how long it was displayed?

[fol. 36] A. No, I don't.

Mr. Van Cott: That is all.

Mr. Shields: That is all.

(Witness excused.)

GEORGE W. HAMLYN was thereupon called as a witness for and on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Van Cott:

Q. State your name.
A. George W. Hamlyn.
Q. You reside in Salt Lake City?
A. Yes sir.
Q. What is your business?
A. Poster for outdoor advertising.
Q. Have you any association or connection as officer with the Packer Corporation in this case?
A. I am manager for the Utah territory.

Mr. Shields: Now, if the court please, in order that the record may be maintained, I now move that, outside of this formal testimony, no further evidence be introduced in connection with this case, of this witness or any other, on the ground that it is incompetent, irrelevant and immaterial, and for the reasons set forth in the demurrer heretofore filed.

The Court: The objection may be overruled.

Mr. Shields: May I have an exception and objection to this testimony?

The Court: You may have, for your record, an exception to the testimony and the ruling.

By Mr. Van Cott:

Q. For how long have you been manager of the Utah territory?
A. Approximately three years.
[fol. 37] Q. So that you were local manager on the 22nd of April, this year?
A. I was.
Q. Did you hear Mr. Maughan's testimony?
A. I did.
Q. You may state whether or not that sign or billboard he described is one of the billboards or advertising boards, owned and operated by your company, Packer Corporation, under you as local manager?

A. Yes, it is.

Q. And was it at all times mentioned in the complaint on the 22nd of April, 1931?

A. It was.

Q. And Packer Corporation, the defendant here, is a corporation?

A. It is a corporation.

Q. And doing business, and has been doing business under the laws of the State of Utah?

A. Yes sir.

Q. And was engaged as such corporation on the 22nd day of April, 1931, in this city, county and state?

A. It was.

Q. Dod you hear Mr. Maughan's description of that display upon that particular billboard as of April 22, 1931?

A. I did.

Q. I will ask you to state if that description given by him is correct?

A. Correct, with one exception as to size.

Q. What is its size or dimensions?

A. 12 by 25 feet, to be exact.

Q. In the other respects his testimony was correct?

A. Right.

Mr. Van Cott: That is all.

Cross-examination.

[fol. 38] By Mr. Shields:

Q. This advertisement which was shown on this billboard, where did you receive that from?

A. We received it from the Foster & Kleiser Company of San Francisco, California, through a contract for Liggett——

Mr. Van Cott: We object to this line of evidence as irrelevant, incompetent and immaterial, this line of cross examination, and move that the answer be stricken.

The Court: Objection overruled.

Mr. Van Cott: Save an exception. And I object to this line of evidence as not proper cross examination, and incompetent, irrelevant and immaterial.

The Court: The evidence is admitted for the reason that it bears directly upon contract relations between parties

varying in different localities as to and in relation to the use of property as it may affect the contract between people in different states.

Mr. Van Cott: Our objection and position in this matter is this: That this billboard is within the State of Utah, County of Salt Lake, and there is a display of advertisements that offend against the law. As to where the advertisement came from, or through whose authority it was sent here, or by whom, seems to us wholly immaterial.

The Court: The court doesn't know, at this time, whether it is a domestic or foreign corporation. It may be a foreign corporation.

Mr. Van Cott: I think that would make no difference.

The Court: It may do.

Mr. Van Cott: It wouldn't be a good defense if it is a foreign corporation.

The Court: This is a question being submitted to the court for the purpose of determining the constitutionality of the statute under which the action is brought. The [fol. 39] court sees no reason why the matters involved should not be presented so that the statute and its relation to the constitution in all its aspects may be full and fairly presented and determined.

Mr. Van Cott: May we have the same objection and exception, without repeating it, to this whole line of testimony.

The Court: You may, if that makes the exception good.

Mr. Van Cott: We will take it in that wholesale manner, and specify it later.

Mr. Shields: Will you read the question, please.

(Question read.)

A. Liggett & Myers Tobacco Company, the lithograph display was received from the Liggett & Myers Tobacco Company in San Francisco, California.

Q. Now, of your own knowledge, were any of these cigarettes advertised, were they, or are they manufactured in Utah?

Mr. Van Cott: I object to that as incompetent, irrelevant and immaterial, not cross examination, and wholly incompetent.

The Court: Objection overruled.

Mr. Van Cott: Save an exception.

A. From the indication on the package of cigarettes, they are manufactured in California.

Q. Are they manufactured in Utah?

A. None manufactured in Utah.

Mr. Van Cott: We will save the same objection and exception to that last question.

The Court: You may have your exception.

Q. This corporation, the Packer Corporation, I understand is a foreign corporation?

A. Correct.

Q. From what State?

[fol. 40] A. Incorporated in the State of Delaware.

Q. Qualified in the State of Utah to do business?

A. We have.

Q. And this advertising which you are doing, the Chesterfield advertisement referred to in this complaint, is the result of a contract made between your foreign corporation at its place of business in Cleveland, Ohio, I understand, and is performed here as a part of a general contract in effect in the United States generally for the advertising of this commodity?

Mr. Van Cott: We object to it, if your Honor please, as incompetent, irrelevant, immaterial, and not proper cross examination.

The Court: Objection overruled.

A. That is it substantially, but there is an individual contract for each particular locality that goes to that particular place.

Q. But your contract is made in Cleveland, Ohio?

A. Generally, yes.

Q. And it is on that contract that this advertising is done?

Mr. Van Cott: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Van Cott: Save an exception.

A. Correct.

Mr. Shields: That is all.

Mr. Van Cott: The State rests.

Mr. Shields: Just a moment, I would like to recall Mr. Hamlyn.

Mr. Van Cott: The State withdraws its offer to rest.

GEORGE W. HAMLYN, recalled, testified further on cross examination by Mr. Shields, as follows:

[fol. 41] Q. This advertising that you are doing, of Chesterfield Cigarettes, is done in Salt Lake County, State of Utah, and other counties in the State, when it is done, as the result of this contract to which you refer?

Mr. Van Cott: If the court please, we object to that as not proper cross examination, and as immaterial and irrelevant.

The Court: Objection overruled.

Mr. Van Cott: Save an exception.

A. Yes.

Q. Do you know, as a matter of fact, and of your own knowledge, that Chesterfield Cigarettes are not manufactured in Utah, and are shipped into the State from outside points?

A. I do.

Mr. Van Cott: I object to that as incompetent, irrelevant and immaterial, and not cross examination. The question of disposition of cigarettes is in no way involved in this case, it is the display, and advertising.

The Court: Objection may be overruled.

Mr. Van Cott: Save an exception.

Mr. Shields: That is all.

Mr. Van Cott: The State rests.

Mr. Shields: The defense rests.

The Court: From the evidence submitted——

Mr. Shields: Just a moment, before the court makes its ruling, I desire now to file a formal motion upon the various grounds set forth in the motion to dismiss the action and discharge the defendants. They are set out here and I will read this into the record:

MOTION TO DISMISS

"Now comes the defendant herein and moves the court to dismiss the above entitled action and discharge the defendant herein upon the grounds and for the reasons:

1. That the complaint herein does not state facts sufficient to constitute a public offense.

2. That there is insufficient evidence introduced in this [fol. 42] action upon which to sustain a conviction that the defendant is guilty of the offense alleged in the complaint.

3. That the statute upon which said complaint is based violates the provisions of Article 1, Section 1, of the Constitution of the State of Utah, with respect to the inherent and inalienable right of the defendant to acquire, possess and protect its property.

4. That the statute upon which said complaint is based violates the provisions of Article 1, Section 7, of the Constitution of the State of Utah, with respect to deprivation of property without due process of law.

5. That the statute upon which said complaint is based violates the provisions of Article 1, Section 18, of the Constitution of the State of Utah, with respect to impairing the obligation of contracts.

6. That the statute upon which said complaint is based violates the provisions of Article 1, Section 24, of the Constitution of the State of Utah, relating to uniform operation of all laws of a general nature.

7. That the statute upon which said complaint is based violates the provisions of Article 1, Section 10 of the Constitution of the United States, respecting impairing of the obligation of contracts.

8. That the statute upon which said complaint is based violates the provisions of Article 1, Section 8, of the Constitution of the United States relating to Interstate Commerce.

9. That the statute upon which said complaint is based violates the provisions of Article 4, Section 2, of the Constitution of the United States respecting the privileges and immunities of citizens in the several states.

10. That the statute upon which said complaint is based violates the provisions of the Fourteenth Amendment of [fol. 43] the Constitution of the United States, respecting the deprivation of property without due process of law and/or respecting the denial to persons within the juris-

diction of the State of Utah of the equal protection of the laws.

This motion is based upon the complaint on file herein, the stipulation of facts heretofore filed herein and upon all records and files in this cause.

Mr. Van Cott: The State opposes the motion.

The Court: The motion of the defendant may be denied.

Mr. Shields: Take an exception.

Mr. Van Cott: Do you waive the time for passing of sentence?

Mr. Shields: Yes, we will waive the time for sentence.

The Court: The defendants having waived time for sentence—the corporation, as provided by the statute, a fine is all that may be imposed. In pursuance of Subdivision F of Section 1, Chapter 5 of the Special Session Laws of 1930, under which this action is brought, the judgment of the court is that the defendant be fined the sum of one hundred dollars.

Mr. Shields: If the court please, I wonder if execution may be stayed pending appeal.

Mr. Van Cott: We have no objection.

The Court: That is the only thing in this matter there is no objection to. You may have a stay of execution.

[fol. 44] Reporter's certificate to foregoing omitted in printing.

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing, having by stipulation of the parties in the above entitled action, been made the Bill of Exceptions the same is hereby settled and allowed.

Dated May 13th, 1931.

David W. Moffat, Judge.

Attest:

Alonzo Mackay, Clerk, by E. R. Warner, Deputy Clerk.

[fol. 45] IN DISTRICT COURT OF SALT LAKE COUNTY

[Title omitted]

STIPULATION RE BILL OF EXCEPTIONS

Come now the parties to the above entitled action by their respective attorneys, and stipulate and agree that

the transcript of the proceedings had in the above entitled matter, made by Grace Hurlbert as official Court Reporter of the evidence, testimony, and proceedings had in the above entitled action on the 8th day of May, 1931, may be considered as and settled and allowed by the Court as the Bill of Exceptions on appeal.

Dated this 12 day of May, 1931.

Ray Van Cott, District Attorney; W. H. Reed, Jr., Dan B. Shields, Attorneys for Defendant.

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] IN SUPREME COURT OF UTAH

[Title omitted]

RETURN TO ALLOWANCE OF APPEAL

In obedience to the commands of the within allowance of appeal, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

It witness whereof I hereunto subscribe my name, and affix the seal of said Supreme Court of Utah, in the City of Salt Lake, this 25 day of August, 1931.

L. M. Cummings; Clerk Supreme Court of Utah.

(Seal, Supreme Court State of Utah.)

Costs of Suit

Plaintiff's costs, none.
Defendant's costs, none.
Costs of transcript, $12.50.

L. M. Cummings, Clerk.

[fol. 48] IN SUPREME COURT OF UTAH

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To Mr. L. C. Cummings, clerk of the Supreme Court of the State of Utah:

You will please prepare the record upon appeal of the above named appellant to the Supreme Court of the United

States from the final judgment and decision of the Supreme Court of the State of Utah entered in said cause in favor of the State of Utah, respondent, and include in such record the following:

The original petition for appeal to the Supreme Court of the United States, with assignments of errors and prayer for reversal attached thereto.

The original allowance of appeal.

A copy of the bond and its approval.

The original citation with proof of service thereon.

A copy of the opinion of the Supreme Court of Utah in such cause.

A copy of the minutes of said court with reference to said cause.

A copy of the petition for re-hearing of the above named appellant.

A copy of the Record on Appeal to said State Supreme Court from the Third Judicial District Court of the State of Utah in and for Salt Lake County.

[fol. 49] Statements showing the filing of such bond, and the lodgement of copies of the allowance of appeal in your office.

Return of such allowance of appeal and the statement of costs.

A copy of this præcipe.

Please certify the same to the said Supreme Court of the United States under your seal and in accordance with the rules of said Court and the laws of the United States upon such appeals.

Dan B. Shields, William H. Reeder, Jr., Attorneys for Appellant.

Residence and Post Office address: 419 Judge Building, Salt Lake City, Utah.

[fol. 50] Certificate of lodgment omitted in printing.

[fol. 51] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 52] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED UPON BY APPELLANT AND DESIGNATION TO PRINT ENTIRE RECORD

Comes now the appellant, and in pursuance to Section 9 of Rule 13 of the above entitled court, sets forth the points on which it intends to rely, and the parts of the record which it thinks necessary for consideration thereof, attached to which is a proof of service upon the appellee, The State of Utah:

That Section 2 of Chapter 145, Laws of Utah, 1929, as amended by Chapter 52, Laws of Utah, 1923, as amended by Chapter 92, Laws of Utah, 1929, is unconstitutional and void; that said section violates the provisions of Article 1, Section 10 of the Constitution of the United States respecting the impairing of the obligations of contracts; that said section violates the provisions of Article 1, Section 8 of the Constitution of the United States relating to interstate Commerce; that said section violates the provisions of Article 4, Section 2 of the Constitution of the United States respecting the privileges and immunities of the citizens of the several states; that said section violates the provisions of the Fourteenth Amendment to the Constitution of the United States respecting the deprivation of property without due process of law, and/or respecting the denial to persons within the durisdiction of the State of Utah of the equal protection of the law; that the classifications set forth in said section are unreasonable, discriminatory, and unjust and that the prohibition against bill boards, etc., therein bears no reasonable relation to the objects sought to be accomplished.

[fol. 53] That appellant's demurrer, and particularly Paragraph 8 thereof, wherein it was contended, "That the statute upon which said complaint is based violated the provisions of Article 1, Section 10 of the Constitution of the United States respecting impairing of the obligations of contracts;" and Paragraph 9 thereof, "That the statute upon which said complaint is based violates the provisions of Article 1, Section 8 of the Constitution of the United States relating to Interstate Commerce;" and Paragraph 11 thereof, "That the statute upon which said complaint is based violates the provisions of Article 4, Section 2 of

the Constitution of the United States respecting the privileges and immunities of citizens of the several states;" and Paragraph 12 thereof, "That the statute upon which said complaint is based violates the provisions of the Fourteenth Amendment of the Constitution of the United States respecting the deprivation of property without due process of law, and/or respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of the law," should have been sustained by the court, and the action of the lower court in overruling said demurrer should have been overruled by the Supreme Court of the State of Utah.

That appellant's motion to dismiss the action and discharge the defendant, and particularly Paragraph 7 thereof, "That the statute upon which said complaint is based violates the provisions of Article 1, Section 10 of the Constitution of the United States respecting impairing of the obligations of contracts;" and Paragraph 8 thereof, "That the statute upon which said complaint is based violates the provisions of Article 1, Section 8 of the Constitution of the United States relating to Interstate Commerce;" and Paragraph 10 thereof, "That the statute upon which said complaint is based violates the provisions of Article 4, Section [fol. 54] 2 of the Constitution of the United States respecting the privileges and immunities of the citizens of the several states;" and Paragraph 11 thereof, "That the statute upon which said complaint is based violates the provisions of the Fourteenth Amendment to the Constitution of the United States respecting the deprivation of property without due process of law, and/or respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of law;" and that the action of the trial court in denying said motion should have been overruled by the Supreme Court of the State of Utah, and the defendant discharged.

That the action of the trial court in finding the defendant guilty was unjustified, illegal, and in violation of the Constitution of the United States, and the Supreme Court of the State of Utah was in error in sustaining such conviction, and particularly was the Supreme Court of the State of Utah in error in holding that said conviction did not violate the provisions of Article 1, Section 10 of the Constitution of the United States respecting impairing of the

obligation of contracts; and did not violate the provisions of Article 1, Section 8 of the Constitution of the United States relating to Interstate Commerce; and did not violate the provisions of Article 4, Section 2 of the Constitution of the United States respecting the privileges and immunities of the citizens of the several states; and did not violate the provisions of the Fourteenth Amendment to the Constitution of the United States respecting the deprivation of property without due process of law, and/or respecting the denial to persons within the jurisdiction of the State of Utah of the equal protection of law.

That all of said objections were preserved in the record, and were raised both in the trial court and in the Supreme [fols. 55-57] Court of the State of Utah, and that for the purpose of consideration of said points, appellant directs that the entire record should be printed, because it will all be necessary to a consideration of the points which appellant intents to present.

The Packer Corporation, a corporation, Appellant. By Dan B. Shields, William H. Reeder, Jr., Attorneys for Appellant.

Copy of the foregoing statement of points upon which appellant intends to rely received this 13th day of October, 1931, and Appellee hereby consents that the same may be received by the Clerk and filed as the original statement of points relied upon by appellant, and substituted in place of said original statement; and that only this statement of points relied upon by appellant need be printed; and appellee hereby waives its right to designate additional parts of the record.

State of Utah, Appellee. By Geo. P. Parker, Attorney General; Byron W. Anderson, Assistant Attorney General, Attorneys for Appellee.

[fol. 58] [File endorsement omitted.]

Endorsed on cover: File No. 36,171. Utah Supreme Court. Term No. 357. The Packer Corporation, appellant, vs. The State of Utah. Filed September 8, 1931. File No. 36,171.